

1. Appendix 1, Pages 2, 5, 19, 20, 22, 23, others: Appendix 1 (extracts from Ecology's Stormwater Management Manual for Western Washington (2005)), contains references to other portions of the Manual that need to be deleted or more clearly explained in text.
2. Appendix 1, Page 20: Minimum Requirement #6 (Runoff Treatment) should be changed to read as follows:
  - Projects in which the total of new effective, pollution-generating impervious surface (PGIS) is 5,000 square feet or more in a threshold discharge area of the project, or
  - Projects in which the total of new pollution-generating pervious surfaces (PGPS) is three-quarters (3/4) of an acre or more....

NOTE: The requirement as stated is independent of a threshold. This change makes the text consistent with Figure 2.2 Flow Chart.

3. Appendix 1, Page 29-20: In this section, Ecology is setting forth required wording for "Adjustments" and "Exceptions/Variations." Different jurisdictions define these three items differently and, in the case of Seattle, combine them into a single category called Exceptions. Recommend Ecology include as an option to meet this requirement, the following.

#### **EXCEPTIONS, VARIANCES, AND ADJUSTMENTS TO REQUIREMENTS**

**A. General.** Requests for exceptions to the requirements shall include alternative requirements, waivers, variances, reductions, adjustments, or modifications of the requirements. An exception shall only be granted to the extent necessary to meet the criteria set forth below. An applicant is not entitled to an exception, whether or not the criteria allowing approval of an exception are met. The Permittee may require an applicant to submit an engineer's report or analysis with a request for an exception. When an exception is granted, the Permittee may impose new or additional requirements to offset or mitigate harm that may be caused by granting the exception, or that would have been prevented if the exception had not been granted.

**B. Equally Protective Exceptions.** The Permittee may approve a request for an exception if the Permittee determines that it is likely to be equally protective of public health, safety and welfare, the environment, and public and private property as the requirement from which an exception is sought.

**C. Other Exceptions.** The Permittee may approve a requested exception even if it is not equally protective of public health, safety and welfare, the environment, and public and private property, or if the Permittee cannot determine whether it is equally protective, if the Permittee determines that substantial reasons exist for approving the requested exception. Substantial reasons may include, but are not limited to:

1. The requirement is not technically feasible;
2. An emergency situation necessitates approval of the exception;
3. No reasonable use of the property is possible unless the exception is approved; and
4. The requirement would cause harm or a significant threat of harm to public health, safety and welfare, the environment, or public and private property, or would cause extreme financial hardship, which outweighs its benefits, and the requested exception would not cause significant harm.

**D. Public Notice.** Public notice of an application for an exception and of the Permittee's decision on the application shall be provided

4. Appendix 2, Page 13: Change to read:

Potential MS4 Permittees –

Phase I permit: City of Seattle, King County (as Co-Permittee)

NOTE: This follows Seattle comments regarding King County as a Co-Permittee as given in S1.C, Attachment 4, and elsewhere.

5. Appendix 3 and Appendix 4, General: Seattle recognizes that Ecology has produced a standardized reporting form in order "to reduce the administrative burden for Ecology and permittees" (Fact Sheet, page 56, line 42). The current draft reporting form requires Permittees to indicate, by providing a single check, the status of meeting "requirements" of the permit. Among the options, a Permittee may check the block "NC" for "not complete as of the deadline in the permit," or "NI" for "not being implemented as of the deadline in the permit." For instances where permit deadlines are not met, Permittees are required to "report the reasons why the requirement was not met and how the requirement will be met in the future, including projected implementation dates." (See Appendix 3, Page 2, and Appendix 4, Page 2.) Ecology has indicated (see Fact Sheet, Page 56, line 46 to Page 57, line 2) that the annual reporting requirement will be used "...to evaluate compliance with permit requirements...." The following points are being raised to Ecology based on Seattle's review of the Reporting Form from the perspective of a permittee tasked with completing it.

A. The forms unreasonably place a permittee in legal jeopardy because they require a Permittee to characterize its actions in order to answer yes/no questions where, in fact, a complete response regarding a complicated program element may require further explanation because it cannot be fairly or accurately be summed up by a yes-or-no-type answer, at risk of civil or criminal penalty. It may not be practicable to answer in this fashion at all. It also is not reasonable to expect Ecology "to evaluate compliance with permit requirements," based on a checked "NC" or "NI" in the absence of supporting information, such as the degree to which the *minimum performance measure* may have been missed, mitigating factors regarding the missed measure, and whether the measure is expected to be missed again. This last point is important, given that some performance measures are cyclical. Three months into a new permit year, a Permittee that indicated "NC" on the form for falling short of a 95% inspection requirement or a requirement to train "all" staff by the end of the preceding calendar year is no longer failing to meet the minimum performance measure at the time of the report is submitted.

B. Noncompliance is better measured by the underlying facts and factors, of which there may be many, than by a single check in a solitary line on a form. It is not clear that this flaw can be fixed if Ecology retains reporting in this format. Some partial solutions:

- The third column "Requirement" should be changed to read "Minimum Performance Measure" and this change reflected in the supporting text throughout Appendix 3 and Appendix 4.
- The Appendix should state: "A response of "NC" or "NI" does not in itself indicate noncompliance with a requirement of the permit, which

is determined based on underlying facts and the provisions of this permit, among other factors.”

- An additional option, “Requires Additional Explanation,” should be added in the same column as “NC” and “NI”, with sufficient space for a Permittee to provide a more complete explanation or description of the status of an element, rather than be constrained to only checking, for example, “NC” vs. “NI.”
  - See Seattle’s recommendation for addressing potential noncompliance below.
6. Appendix 3 and Appendix 4, General: Given the complications that arise with Ecology’s prescriptive approach (over 50 reportable items on the Report Form, not including monitoring), the difficulty in determining the term of the activity, and the issues involved in determining the nature of, and remedy for noncompliance with the permit as described above, Seattle proposes Ecology consider an alternative approach, to be contained as a General Permit Condition, as broadly outlined below:

*Any Permittee that is unable to achieve one or more of the minimum performance measures remains in compliance with the permit provided the following conditions have been met:*

- A. The Permittee has made a good faith effort to meet the minimum performance measure.*
- B. The Permittee has notified Ecology in a timely manner that the minimum performance measure will not be, or has not been, met.*
- C. The Permittee has provided Ecology a plan designed to meet the minimum performance measure within a reasonable timeframe.*

*Ecology may choose to inform Permittee that its plan to meet the minimum performance measure must be improved. Any noncompliance determined based on a performance measure is considered a single, one-day violation.*

7. Appendix 3 and Appendix 4, General: Seattle would prefer narrative reporting format that summarizes a Permittee’s program and accomplishments instead of (and not in addition to) App. 3 or App. 4. Although simplified and streamlined reports are feasible for small sites and most industrial facilities, a multiple-choice check-the-block format does not portray the true scale, scope, priorities, innovations, challenges, and level of effort being undertaken by a Permittee executing the Stormwater Management Program as required in this permit.
8. Appendix 3 and Appendix 4, General: If Ecology retains the Report Form, the introductory material (see Page 1, sentence 1 and similar statements elsewhere), then it should contain a statement to the effect that: “The annual report forms summarize the requirements of the permit and are not intended to change or re-characterize the requirements of the permit or to impose additional or different requirements on the permittee.”

9. Appendix 3 and Appendix 4, General: Where Seattle has submitted recommendations regarding elements in the permit, Seattle also requests that the same element should also be changed in the reporting form in every instance.
10. Appendix 3, Page 2. In the "Column 8: Status Report Attached" description, please clarify the phrase "required submittal information" in first paragraph. Is "required submittal information" the status reports (discussed later in the paragraph) and any items in Column 9 "Additional Submittals"? If so, Ecology should call this out specifically. Also, Ecology should allow flexibility that if "Additional Submittals" have been submitted to Ecology prior to the Annual Report (e.g., S.5.C.5.b.i, ii, iii, and iv. for which the Additional Submittal is the "requirements, standards, and manual to Ecology for review and approval"), that the "Additional Submittal" does not need to be attached to the annual report and, instead, the previous submittal to Ecology referenced.
11. Appendix 3, Page 3 (second bullet), and Appendix 4, Page 3 (second bullet): General instructions for cost reporting includes a requirement to include depreciation costs. Some jurisdictions do not depreciate vehicles and equipment, therefore, Seattle recommends changing to read:

Direct costs (e.g., phone, field and office supplies, etc.) and depreciation costs, as applicable (e.g., vehicles and equipment) should also be included for each component.
12. Appendix 3, Page 3 (second bullet), and Appendix 4, Page 3 (second bullet): General instructions for completing Form 3-2 (Expenditure Report Form) must be clearly identified as requiring general, gross estimates, which are created only for the purposed of this report and using the assumptions and principles of analysis assigned by Ecology.
13. Appendix 3, Expenditure Report Form and Supporting Text: Per Seattle's comments on S8 (Monitoring) and S9 (Reporting), strongly recommend incorporating costs for monitoring program into Form 3-2 (Expenditure Report Form). Seattle estimates that meeting the monitoring requirements contained in S8 during the five year permit term will be on the order of several million dollars. This cost should be represented within the context of the other stormwater program components.
14. Appendix 3 (Report Form 3-1) and Appendix 4 (Report Form 4-1): To be consistent with the permit at S5.C (and S6 equivalent), the third column in Form 3-1 and Form 4-1 should be titled "Minimum Performance Measure" rather than "Requirement." Other inconsistencies between Form 3-1 and the current draft permit (i.e., Seattle's recommendations are not incorporated below) are listed below:
  - Form 3-1, row beginning S.5.C.6.b.i. In S5.C.6.b.i., deadline for completion is 18 months. For consistency in Form 3-1, *Deadline for Completion* should be changed to 1.5 years.
  - Form 3-1, row beginning S.5.C.8.b.viii for "Response to illicit connections". This row refers to S.5.C.8.B.vii.
  - Form 3-1, row beginning S.5.C.9.b.v. "Additional submittal?" column text should be changed to "Summary of maintenance or repairs" for consistency with text in S.5.C.9.b.v.
  - Form 3-1, row beginning S.5.C.10.b.ii for "Measure understanding and adoption of targeted behavior". This row refers to S.5.C.10.b.iii.

- Form 3-1, row beginning S.5.C.10.b.ii for “Track and maintain records of public education activities”. This row refers to S.5.C.10.b.iv.

15. Appendix 3 (Report Form 3-1): Clarifications needed on Form 3-1:

- Row beginning S.5.C.2.b.v.ii. Clarify intent of “as needed”. Is reporting required only if maps are requested?
- Row beginning S.5.C.4.b.ii. Clarify “submittals.” Are these the additional submittals listed in column 9 of Form 3-1?
- “Deadline for completion (years)” column. Provide description of use of “\*” in column.
- “Compliance Reporting Date” column. Provide description of use of “#” in column.
- Rows beginning S.5.C.8.b.vi. Clarify the compliance reporting date requirement “report with application.” The report is not discussed in S.5.C.8.b.vi.

The inconsistencies and clarifications provided above do not reflect or incorporate Seattle’s recommended changes as presented elsewhere.

16. Appendix 5, General: In the Notice of Intent, recommend Ecology include on the NOI form a field for the Special District applying for Secondary Permittee coverage to indicate the Phase I and/or Phase II jurisdiction(s) in which it is located.

17. Appendix 6, General: The appendix on Street Waste Disposal should be deleted (as should references to the Appendix in S7.C.9.b.iv.(3) and G10), because this is a permit for discharges of stormwater from MS3s to waters, not a street waste decant liquid discharge permit. The appendix would improperly bootstrap into the NPDES permit matters that should be dealt with through enforcement of other discharge authorizations, likely by local government rather than state government acting under federal authority. Furthermore, Appendix 6 appears to be adapted from Ecology guidelines, not supported by law. Including Appendix 6 would be acceptable only if presented in a non-mandatory form that is provided purely for informational purposes.

If Ecology elects not to accept this comment: Specific reference to possible future discharge authorization from a sewer authority for street decant water should be deleted. This is speculative, uncertain, and does not allow the Permittee to know or appeal the terms of its NPDES permit. Therefore, delete in #1: “Following the conditions is a permit requirement.” Delete in #2: “Following the conditions is a permit requirement.” All mandatory language would need to be made non-mandatory.

18. Appendix 7, General. The Appendix on Determining Construction Site Sediment Damage Potential provides an objective tool for evaluating the potential of a construction site to discharge sediment. However, there still should be retained some subjectivity on the part of permittees to tailor such a methodology to fit local requirements. Seattle, for example, has a different slope criteria than the 25% listed in Appendix 7 in its Critical Areas Ordinance. Determining freshwater streams and their tributaries “that would be Salmonid bearing if not for anthropogenic barriers” is not a reasonable criterion for a built environment with a 150 year history of development. Seattle proposes that Ecology include in Appendix 7 a sentence to the effect that, “Permittees may use the rating system as described below or develop another systematic process designed to identify site-specific features which indicate that the site must be inspected prior to clearing and construction.”

19. Fact Sheet, General: Seattle has extensively commented on sections of the permit and on principles that are discussed by Ecology in the Fact Sheet. Instead of repeating those comments here, Seattle incorporates them here, as applicable to the Fact Sheet, and requests that the Fact Sheet be revised to reflect Seattle's comments. In addition, Seattle's silence on Ecology's interpretation of data and legal principles should not be taken as assent. Seattle respectfully takes issue consistent with its other comments.
20. Fact Sheet, Throughout: Ecology refers to the "requirements" of (1) federal regulations for Phase I MS4 permits (throughout; examples at pp. 30, 31, 34, 36, 38), and (2) TMDLS (pp. 46-48). Seattle asks that these references be corrected. EPA regulations lay out application requirements for Phase I requirements, some for a proposed SWMP, but do not specify required elements of the stormwater permit. 40 CFR 122.26(d). TMDLs are planning tools that are not independently enforceable; associated implementation plans have even less legal significance. NPDES permits can create enforceable obligations that implement TMDLs.
21. Fact Sheet, Page 20-21: Recommend Ecology add verbiage regarding the intent of the Secondary Permittee classification that confirms that a Phase I jurisdiction will never be a Secondary Permittee. Coordination among Permittees with physically interconnected MS3s remains a requirement (S5.C.3), but Ecology neither requires nor desires any city, town, or county to submit an NOI to Ecology requesting coverage as a Secondary Permittee whenever its MS3 is located within the jurisdiction of another Phase I or Phase II Permittee.
22. Fact Sheet (pp. 23-26, 6 (WQS), 21-23 (authorized discharges), etc.): Seattle agrees with Ecology's observations that the variable, intermittent, and ubiquitous nature of municipal stormwater poses permitting challenges. As indicated in Seattle's comments and alternative on S4, Seattle does not agree with using water quality standards as "a measurement of SWMP effectiveness" at this time and does not agree with the proposed permit condition mentioning RCW 90.48.520. Because of stormwater's challenges, it is not only "difficult" but it is "infeasible" to "apply conventional end-of-pipe treatment options to existing" or new municipal stormwater discharges. (See Fact Sheet, p. 12) As stated in Seattle's comments on S8, the proposed water quality monitoring is not an effective feedback tool at this time. Seattle also proposes an alternative approach to "authorized discharges" that is better suited to the reality of municipal stormwater.
23. Fact Sheet (pp. 19, 24, 27, 33): Seattle agrees with the Fact Sheet when it recognizes permit compliance meets MEP and AKART. This connection should be stated explicitly in the permit as well.
24. Fact Sheet (p. 30, lines 27-29): Please correct the characterization: there was no ongoing requirement to revise local stormwater manuals under the 1995 permit after permittees made the update required during the original five-year term.
25. Fact Sheet (p. 31, lines 31-41): Please clarify. The federal municipal stormwater regulation application requirements mention pollutant reduction only; they do not mention flow control or rate.
26. Fact Sheet (p. 33, lines 12-17): Please clarify Ecology's description of the requirement of S5.C.5.(b).v. How does Ecology understand that a new requirement to establish local legal authority will respond to the legal limits placed by the McCready case, which are limits based in state and federal law? What new local authority, specifically, does Ecology anticipate?

27. Fact Sheet, Pages 51-52: In table containing the “List of Parameters to Measure in Accumulated Sediment, recommend deleting numbers after each parameter. It is not necessary to reference these numbers (sediment management standards) in this table.
28. Fact Sheet, Appendix C: The monitoring program cost estimates provided by Ecology for BMP Evaluation Monitoring (Section S8.C) underestimates of the costs associated with implementing the monitoring as required in the Draft Permit. Seattle’s preliminary cost estimate to implement the monitoring required in the draft permit is included as Attachment 7 of Seattle’s Comment Letter.

Seattle estimates the cost for the first year of sample collection for Section S8.C (Year 2009) would be between \$365,000 and \$476,200 (see Attachment 7 – Year 2009). This is three to four times the cost estimated by Ecology (\$113,855). Several of the factors that contribute to the difference estimates are:

- Ecology includes unrealistic assumptions about the level of effort required to mobilize staff, set-up samplers, collect samples, process samples for analysis, and deliver samples to laboratory for each storm event. Ecology has assumed four hours for two employees (i.e., 8 hours) for each storm event. Based on Seattle’s experience, 36 hours was used in our analysis.
- Ecology has not included in its estimate the hours necessary to provide QA/QC data review, manage data, analyze data, or report on data. Seattle has included these items.
- Ecology hourly labor costs are low. They do not account for overhead multiplier. Ecology estimate assumes \$35/hr, approximately \$70,000/year/FTE. Seattle assumed \$100,000/year/FTE.

In addition, Ecology did not provide in its estimate the start-up costs (e.g., monitoring program design, QAPP development, equipment installation) associated with each monitoring program. These factors have been included in Seattle’s estimate for the 5-year permit cycle cost of the required monitoring (See Attachment 7). In addition, Seattle included estimates for Section S8.A and S8.B. Over the five year permit terms, Seattle estimates it would cost between \$2.6 million to \$3.5 million to implement the monitoring required in the draft NPDES permit.